

**DOCKET NO. 587139**

IN RE FIRESIDE	§	BEFORE THE
	§	
PERMIT NOS. N-102037, NL162873, & PE102038	§	TEXAS ALCOHOLIC
	§	
BELL COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-0199)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 10th day of August, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Suzan M. Shinder. The hearing convened on May 19, 2000, and adjourned May 19, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on July 11, 2000. This Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

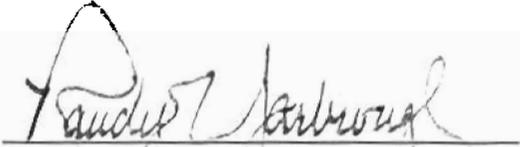
**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit Nos. N-102037, NL102873 and PE102038 are herein **SUSPENDED for a period of forty-five (45) days, beginning at 12:01 A.M. on the 20th day of September, 2000**, unless Respondent pays a civil penalty in the amount of \$6,750.00 on or before the 13th day of September, 2000.

**This Order will become final and enforceable on August 31, 2000**, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

**WITNESS MY HAND AND SEAL OF OFFICE** on this the 10th day of August, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

CB/bc

The Honorable Suzan M. Shinder  
Administrative Law Judge  
State Office of Administrative Hearings  
**VIA FACSIMILE (254) 750-9380**

Holly Wise, Docket Clerk  
State Office of Administrative Hearings  
300 West 15th Street, Suite 504  
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Fireside  
**RESPONDENT**  
890 Rattlesnake  
Harker Heights, Texas 76543-1460  
**CERTIFIED MAIL/RRR NO. Z 473 042 878**

Christopher Burnett  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division  
Waco District Office

**DOCKET NO. 458-00-0199**

**TEXAS ALCOHOLIC BEVERAGE  
COMMISSION**

**VS.**

**FIRESIDE  
PERMIT NOS. N-102037, NL-162873,  
& PE-102038  
BELL COUNTY, TEXAS  
(TABC CASE NO. 587139)**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

The Staff of the Texas Alcoholic beverage Commission (Commission) initiated this action seeking a forty-five day suspension of the permit and license, or \$150.00 per day civil penalty in lieu of suspension, of Fireside (Respondent), based on the Commission's allegations that on or about November 18, 1999, an employee, servant, or agent of Respondent, did then and there: transport uninvoiced alcoholic beverages onto the premises, in violation of Section 32.08(b) of the Texas Alcoholic Beverage Code (Code); on the licensed premises possess, or permit to be possessed, alcoholic beverages not covered by an invoice, in violation of Section 28.06(a) of the Code, which is grounds for suspension or cancellation of the permits under Section 11.61(b)(2) of the Code; and on the licensed premises sell liquor for purposes of resale, in violation of Sections 22.01(2) and 11.61(b)(2) of the Code. Respondent contended that the beer in question was for personal use, and that, although Respondent was not in physical possession of the invoices in question while Respondent was transporting the liquor, Respondent did have these invoices somewhere in the bar. This Proposal For Decision recommends a suspension of forty-five days, or \$150.00 per day civil penalty in lieu of suspension.

**I. Jurisdiction, Notice, and Procedural History**

The hearing on the merits convened on May 19, 2000, before Administrative Law Judge Suzan Shinder, in the offices of the State Office of Administrative Hearings (SOAH) in Waco, McLennan County, Texas. The Commission appeared by and through its staff attorney, Christopher Burnett. Respondent appeared pro se, by Michael A. Jacob, its co-owner and president. The hearing was concluded and the record was closed the same day.

The Commission and SOAH have jurisdiction of this matter as reflected in the Conclusions Of Law. The notice of intent to institute the enforcement action and of the hearing met the notice requirements imposed by statute and rule as set forth in the Findings Of Fact and Conclusions Of Law.

## **II. The Evidence**

It was not disputed that, on November 18, 1999, Agent Garcia observed Michael A. Jacob, the president and co-owner of Fireside, parking in the Fireside parking lot, transporting six bottles of liquor, some of which were partially full bottles of liquor with broken seals. At that time, Mr. Jacob was not in physical possession of the invoices for this liquor. Agent Garcia then observed Mr. Jacob carrying these bottles of liquor from his vehicle, into the licensed premises. It was not disputed that Agent Garcia also observed Mr. Jacob's vehicle trunk to contain eight packages of eighteen cans of beer that had recently been purchased from a retailer. At that time, Mr. Jacob was not in physical possession of an invoice for this beer.

### **Commission's Exhibit No. 1; Grocery Store Receipt:**

This receipt from the "H-E-B" grocery store indicates purchases of: one turkey, eight packages of eighteen "Lite," and sweet potatoes. The receipt is dated November 18, 1999 at 8:51 a.m. By the purchase of the "Lite," a date of birth is listed as February 3, 1965.

### **Commission's Exhibit No. 2; Two Photographs:**

1. Top Photograph: This photograph depicts six bottles of liquor, containing variable amounts of liquid, sitting on top of multiple boxes of Miller Lite beer. There are three seals glued to this picture: One seal states "T.A.B.C. No. T 42077566, on premise consumption," and there is an indication that this seal is for one of the Crown Royal bottles in the picture; one seal states "T.A.B.C. No. T 42067785, on premise consumption," and there is an indication that this seal is for the pictured bottle of Root Beer Schnapps; and one seal states "T.A.B.C. No. T 42067891, on premise consumption," and there is an indication that this seal is for the pictured Bacardi. All of these seals are intact. The picture also depicts a sheet of white paper, appearing to be a form, lying on top of the boxes of beer.

2. Bottom Photograph: This photograph depicts the same six bottles of liquor as in the top photograph, containing variable amounts of liquid, sitting on top of multiple boxes of Miller Lite beer. There are three seals glued to this picture: One seal has an indication that it is for one of the Crown Royal bottles in the picture; one seal has an indication that it is for the bottle of Amaretto pictured; and one seal has an indication that it is for the pictured bottle of Southern Comfort. These three seals are torn in half, obliterating the number at the location of the tear. The picture also depicts a sheet of white paper, appearing to be a form, lying on top of the boxes of beer.

### **Commission's Exhibit No. 3; Respondent's permits, violation history, and supporting affidavit:**

A Private Club Registration Permit, N-102037, and Beverage Cartage Permit, PE-102038, were issued by the Commission, on the 29th day of June, 1977. A Private Club Late Hours Permit, NL-162873, was issued by the Commission, on the 29th day of June, 1984. All of these permits have been continuously renewed. All of these permits were issued to an unincorporated association of persons, doing business as Fireside, located in the northeast corner, of the intersection of FM 2410 and Dana Peak Road, Harker Heights, Bell County, Texas.

Among other things, Respondent's violation history includes having uninvoiced beverages on July 28, 1991; and transporting alcoholic beverages in an unauthorized vehicle, purchasing from an unauthorized source, and possession of unauthorized alcoholic beverages by an employee, on October 6, 1990, as reflected by orders of the Commission executed on October 10, 1991 and December 24, 1990, respectively.

**Stipulation of Both Parties:**

On November 18, 1999, Agent Garcia seized eight packs of eighteen cans of Miller Lite beer from Respondent, that had been purchased from another retailer, and transported onto the parking lot of Fireside.

**Agent Daniel Garcia's Testimony:**

Agent Garcia is an enforcement agent for the Commission, working out of the Waco District Office. He has been employed by the Commission for six years. He has had contact with Fireside, a private club, inspecting the club approximately twice per year. A private club can sell liquor and operate in a "dry area," meaning an area in which liquor cannot otherwise be sold. A private club can apply for a beverage cartage permit, which allows the license holder to travel into a "wet" area to purchase liquor from a distributor. Under these circumstances, when alcoholic beverages are purchased and transported to a dry area, the invoice from the distributor, for the alcohol, must be carried with the alcohol. The invoice will state the quantity and name brand of the alcohol purchased. Fireside does have a beverage cartage permit.

Agent Garcia received an anonymous phone call, detailing violations alleged to be committed by Fireside. The agent was informed that he could expect the owner of Fireside to drive up to the licensed premises in a certain colored car and to remove boxes of liquor from his vehicle. As a result of this phone call, Agent Garcia investigated Fireside on November 18, 1999, at approximately 10:00 a.m., from a distance, using binoculars. He observed Michael A. Jacob to drive into the Fireside parking lot, remove boxes from his vehicle, and take them inside the licensed premises. Agent Garcia drove into the parking lot and met Mr. Jacob at the door of the premises. Inside the box that Mr. Jacob was carrying, the agent found three liquor bottles that were only partially filled with liquor. All of the T.A.B.C. seals (stamps) on the bottles were broken. He asked Mr. Jacob for the invoices on these bottles and Mr. Jacob did not produce them. The agent inspected Mr. Jacob's vehicle and found eight cases of cold Miller Lite beer in the trunk. Mr. Jacob told the agent that his wife had purchased the beer the prior day, November 17, 1999 at the H-E-B in Harker Heights. He told the agent that he did not have the receipt at that time, but would provide the receipt in the future. Mr. Jacob did eventually produce a receipt for Lite beer, dated November 18, 1999, at 8:51 a.m. from the H-E-B grocery store. Mr. Jacob told the agent that the beer was purchased to re-stock Fireside for the weekend. It is not legal for one retailer to purchase alcoholic beverages from another retailer, for purposes of resale. Based on this, the agent seized the beer from Respondent, as well as the liquor.

T.A.B.C. stamps are an acknowledgment of payment of the 14% tax on liquor. T.A.B.C. stamps are serially numbered, and this number is put on the invoice at the time of purchase by the distributor, to

allow tracking on the payment of the taxes. These numbers can be utilized to determine where the liquor is purchased. The invoices for the above described bottles of liquor were later produced by Susan Whitehead, the manager of Fireside, revealing that they had been purchased in June of 1999.

#### **Susan Whitehead's Testimony:**

Susan Whitehead is the manager of Fireside. Fireside usually carries various types of alcohol, including: multiple varieties of beer, including Miller Lite beer; and multiple varieties of liquor, including Crown Royal Whiskey, Schnapps, and Bacardi Rum. Ms. Whitehead never gave Agent Garcia any invoices for the above described bottles of liquor. It is illegal to refill a bottle from another bottle of alcohol, and Fireside has never done this.

#### **Michael A. Jacob's Testimony:**

When Mr. Jacob encountered Agent Garcia on November 18, 1999, he told the agent that Mr. Jacob's mother purchased the beer that morning at the H-E-B. That is why the beer was still cold. Mr. Jacob asked his mother to get the beer for him because it was on sale. If it had been purchased from a distributor, it would have cost two or three dollars more per case. It was for his personal use, for a Thanksgiving party. Mr. Jacob picked up the beer from his mother, put it in the trunk of his car, and drove to Fireside. When he showed the agent the beer in his trunk, he told him about his mother and the reason the beer was purchased. The agent let him leave to get the receipt from his mother, he brought the receipt back to Fireside, and he gave it to the agent.

On November 18, 1999, Mr. Jacob showed the agent the bottles of liquor that he had just taken out of his trunk and into Fireside. Mr. Jacob told the agent that, although he did not have the invoices on him, the invoices were somewhere in the club. These bottles of liquor had been opened, and were not full. Some liquor bottles in Fireside are as much as one-year old. Fireside is a small club and often unsupervised by a manager. Bottles may not get rotated, and the bartender may open a newer bottle instead of serving from an older, open bottle.

### **III. Discussion**

Pursuant to Section 32.08(b) of the Code, the Commission must prove that Respondent, transported alcoholic beverages onto the licensed premises, and that the alcoholic beverages were not accompanied by a written statement, specifically described as a statement furnished and signed by the distributor showing the name and address of the consignee and consignor, and the origin and destination of the shipment. The person transporting the alcoholic beverages must exhibit the written statement to any representative of the Commission or any peace officer on demand, and this statement is prima facie evidence of the lawful right to transport the alcoholic beverages. The acts and omissions of Michael A. Jacob, the co-owner and president of Fireside, are also the acts and omissions of the permittee, Fireside, as contemplated by Section 1.04(11) of the Code; which would include any agent, servant, or employee of the holder of the permit, as the "permittee." The acts and omissions of other persons, as agents of Michael A. Jacob, for Fireside, are also the acts and omissions of the permittee, Fireside, as contemplated by Section 1.04(11) of the Code; which would include any agent, servant, or employee of the holder of the permit, as the "permittee."

Pursuant to Section 1.04(19) of the Code, "premises" has the meaning given to it in Section 11.49 of the Code, which states that "premises" means the grounds and all buildings, vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person. Pursuant to Section 28.06(a) of the Code, the Commission must prove that Respondent possessed alcoholic beverages not covered by an invoice, on the licensed premises. Invoice is defined at 16 TEX. ADMIN. CODE (Rules) §41.50 (1999) as an instrument issued by the seller of the alcoholic beverages to a permittee. The Commission must prove that Respondent violated Section 22.01(2) of the Code, which authorizes the holder of a package store permit to sell liquor in unbroken original containers on or from his licensed premises at retail to consumers for off-premises consumption only and not for the purpose of resale. Pursuant to Section 11.61(b)(2) of the Code, the Commission may suspend for not more than sixty days or cancel a permit if it is found, that the permittee violated a provision of the Code or a rule of the Commission.

Michael A. Jacob is the co-owner and president of Fireside. On November 18, 1999, Agent Daniel Garcia observed Michael A. Jacob drive into the parking lot of Fireside and unload several bottles of liquor from the trunk of his vehicle. Some of these bottles were open, and were not full, but still contained varying quantities of liquor. The agent observed Mr. Jacob unload these bottles of liquor and carry them into the licensed premises. The agent asked Mr. Jacob to produce an invoice for these bottles of liquor, but he was not able to do so. The agent returned to Fireside sometime later, and the manager of Fireside, Susan Whitehead, was able to produce invoices for these bottles of liquor at that time, indicating that they were purchased in June of 1999. Based on these facts, Respondent transported alcoholic beverages onto the licensed premises that were not accompanied by a written statement furnished and signed by the local distributor, showing the name and address of the consignee and consignor, the origin and destination of the shipment, and was not able to produce such a statement for these alcoholic beverages to the agent on demand, in violation of Section 32.08(b) of the Code.

At the time of the above described November 18, 1999 events, Agent Garcia also observed that Mr. Jacob had eight packages of eighteen cans of beer in the trunk of his vehicle. Based on the stipulation of both parties, there is no dispute that the beer was purchased from a retailer. Although Mr. Jacob asserted that he directed his mother to buy the beer for his personal use, more likely than not, this beer was purchased to stock Fireside, for the purpose of resale. This beer was purchased from a retailer, who is only authorized to sell the alcohol at retail to consumers for off-premises consumption only and not for the purpose of resale. In that this beer was purchased for resale, Respondent purchased the beer from an unauthorized seller, in violation of Section 22.01(2) of the Code.

Additionally, based on the more credible evidence, Mr. Jacob was transporting this beer onto the licensed premises to stock Fireside, for purposes of resale. The receipt from H-E-B does not recite the information required by Section 32.08(b) of the Code when an alcoholic beverage is transported under these circumstances. Based on this, Respondent transported the beer onto the licensed premises, in violation of Section 32.08(b) of the Code.

Section 41.50 of the Rules defines "invoice" as an instrument issued by the seller of the alcoholic beverages to a permittee. An "invoice" is more broadly defined in this section, than the written

statement required by Section 32.08(b) of the Code, when the same alcoholic beverages are transported. Agent Garcia was eventually given invoices, as defined by Section 41.50 of the Rules, for all of the above described alcoholic beverages. Based on this, Respondent did not violate Section 28.06(a) of the Code.

### FINDINGS OF FACT

1. There were no contested issues of notice or jurisdiction in this proceeding, and Respondent received proper and timely notice of the hearing on the merits from the Commission in a Notice of Hearing served on Respondent by Certified Mail, No. Z 473 040 121, as evidenced by the notice's Certificate of Service, by the stipulation of both parties, and by Respondent's appearance, by Michael A. Jacob, and participation in the hearing on the merits of May 19, 2000.
2. The Notice of Hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
3. The hearing was convened on May 19, 2000 at the Hearings Facility of the State Office of Administrative Hearings, 801 Austin Avenue, Suite 750, Waco, Texas. Respondent appeared pro se, by Michael A. Jacob, its co-owner and president. The Texas Alcoholic Beverage Commission (Commission) appeared by and through its Assistant Attorney General, Christopher Burnett. Evidence and argument were heard, and the record was closed the same day.
4. Respondent is the holder of a Private Club Registration Permit, N-102037, and Beverage Cartage Permit, PE-102038, issued by the Commission, on the 29th day of June, 1977. Respondent is also the holder of a Private Club Late Hours Permit, NL-162873, issued by the Commission, on the 29th day of June, 1984. All of these permits have been continuously renewed. All of these permits were issued to an unincorporated association of persons, doing business as Fireside, located in the northeast corner, of the intersection of FM 2410 and Dana Peak Road, Harker Heights, Bell County, Texas.
5. As its co-owner and president, Michael A. Jacob was an agent of Fireside. Mr. Jacob's mother purchased beer for Fireside, at Mr. Jacob's direction.
6. On November 18, 1999, Agent Daniel Garcia observed Michael A. Jacob transporting eight packages of eighteen cans of beer, and several bottles of liquor onto the Fireside parking lot. He observed Mr. Jacob carry the liquor into Fireside. Some of the bottles of liquor were open, and were not full, but contained varying amounts of liquor.
7. The beer described in Finding of Fact No. 5 and 6 was purchased to restock Fireside for the weekend. Based on the stipulation of both parties, the beer described in Finding of Fact No. 5 and 6, was purchased from a retailer.

8. At that time, Mr. Jacob was not able to produce a statement furnished and signed by a local distributor, showing the name and address of the consignee and consignor, and the origin and destination of the shipment, for any of alcoholic beverages described in Finding of Fact No. 6. Respondent had been transporting these alcoholic beverages when they were not accompanied by such statement.

9. Respondent was eventually able to produce invoices for the alcoholic beverages described in Finding of Fact No. 6

10. The invoice for the above described beer was unsigned; it indicated that it was purchased from H-E-B, at an unknown location; it did not indicate the purchaser, or "consignee"; and it did not indicate the destination of the shipment.

11. Respondent's violation history includes having uninvoiced beverages on July 28, 1991; and transporting alcoholic beverages in an unauthorized vehicle, purchasing from an unauthorized source, and possession of unauthorized alcoholic beverages by an employee, on October 6, 1990, as reflected by orders of the Commission executed on October 10, 1991 and December 24, 1990, respectively.

### CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Subchapter B of Chapter 5, of the TEX. ALCO. BEV. CODE (Vernon 1995)(Code).

2. The State Office of Administrative Hearings has jurisdiction over the matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T. CODE ANN. §§2003.021(b) and 2003.042(6)(Vernon 2000).

3. As referenced in Findings of Fact Nos. 1-3, the parties received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. §§2001.051 and 2001.052 (Vernon 2000).

4. Respondent Fireside's parking lot, and the vehicle utilized by Michael A. Jacob to transport the alcoholic beverages described in Finding of Fact No. 6, are a part of the licensed "premises" pursuant to Sections 1.04(19) and 11.49 of the Code (Vernon 1995).

5. The acts and omissions of Michael A. Jacob, the co-owner and president of Fireside, are also the acts and omissions of the permittee, Fireside, as contemplated by Section 1.04(11) of the Code (Vernon 1995) which would include any agent, servant, or employee of the holder of the permit, as the "permittee." The acts and omissions of Michael A. Jacob's mother, as an agent of Mr. Jacob, for Fireside, are also the acts and omissions of the permittee, Fireside, as contemplated by Section 1.04(11) of the Code; which would include any agent, servant, or employee of the holder of the permit, as the "permittee."

6. Based on Findings of Fact Nos. 5,6,7,8 and 10, Respondent transported alcoholic beverages onto the licensed premises, and those alcoholic beverages were not accompanied by a written

statement, furnished and signed by the distributor showing the name and address of the consignee and consignor, and the origin and destination of the shipment, in violation of Section 32.08(b) of the Code (Vernon 1995).

7. Based on Finding of Fact No. 5, 6, and 7, Respondent, by Michael A. Jacob, using his mother as an agent of Fireside, purchased beer for Fireside, for the purpose of resale, from a retailer, who was not authorized to sell alcoholic beverages for the purpose of resale, in violation of Section 22.01(2) of the Code (Vernon 1995).

8. Based on Finding of Fact No. 9, Respondent did eventually produce documents regarding the above described liquor and beer, issued by the seller to the permittee. These documents were sufficient to be invoices, as defined by Section 41.50 of the Rules (1999), as required by Section 28.06(a) of the Code (Vernon 1995), and did not violate this section of the Code.

9. Pursuant to Section 11.61(b)(2) of the Code (Vernon 1995), the Commission may suspend for not more than 60 days or cancel a permit if it is found, that the permittee violated a provision of the Code or a rule of the Commission.

10. Pursuant to Section 11.64 of the Code (Vernon 1995 & Supp. 2000), when the Commission is authorized to suspend a permit or license, the amount of the civil penalty in lieu of suspension, may not be less than \$150.00 per day, for each day the permit or license was to have been suspended.

11. Based on Findings of Fact Nos. 5, 6, 7, 8, 10 and 11, and Conclusions of Law Nos. 4, 5, 6, 7, 9, and 10, a 45 day suspension of Respondent's permits is warranted. In the alternative, Respondent should pay a civil fine of \$150.00 per day for 45 days, for a total of \$6,750.00.

Signed this 11<sup>th</sup> day of July, 2000.



**Suzan Moon Shinder**  
**Administrative Law Judge**